Supreme Court, U.S.
FILED

961720 APR 28 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

PHILLIP JEROME JONES,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals, Ninth District Of Texas
At Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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April 28, 1997

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QUESTIONS PRESENTED

(1) Does the conviction herein violate Federal standards regarding sufficiency of the evidence on the basis that the evidence failed to establish the *actus reus* of the offense, thereby deciding an important question of federal law in a way that conflicts with relevant decisions of this Court?

(2) Does the decision of the Court of Appeals deny petitioner due process of law by failing to review the appellate complaint concerning factual sufficiency of the evidence?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, PHILLIP JEROME JONES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, holding that the evidence was sufficient to support the conviction of possession of a controlled substance and failing to review the issue of factual sufficiency.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont, Texas, is unpublished but appears in Appendix A to this petition as *PHILLIP JEROME JONES v. The State of Texas*, #09-95-126-CR, October 23, 1996.

This petition is timely filed in that it is filed seeking review of a lower state court judgment subject to discretionary review by the state court of last resort, the Texas Court of Criminal Appeals, Austin, Texas, within 90 days after the entry of the order denying discretionary review. The Texas Court of Criminal Appeals refused discretionary review on January 29, 1997. A copy of the order denying discretionary review by the Texas Court of Criminal Appeals appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals, Ninth District of Texas at Beaumont's opinion in this matter was filed on October

23, 1996. The Texas Court of Criminal Appeals refused discretionary review on January 29, 1997. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257, and pursuant to the U.S. Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution, a copy of which is appended as Appendix C, is involved to the extent that the decision of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, denied petitioner due process of law.

The statute upon which petitioner was convicted is Texas Controlled Substances Act, §481.112.

STATEMENT OF THE CASE

This petition involves a conviction arising from a prosecution in the 260th District Court of Orange County, Texas at Orange, Texas, of the felony offense of possession of a controlled substance. Petitioner raised the federal questions involved before the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in the original Brief for Appellant timely filed with the Court of Appeals on September 11, 1995, by pointing out by specific citations references in the trial record and the various opinions requiring an acquittal based upon issues involving constitutional dimensions. Petitioner's original brief complaining of the insufficiency of the evidence and setting

out the original complaints warranting a reversal of the conviction is appended hereto as Exhibit D.

Petitioner, PHILLIP JEROME JONES, contends that the evidence was insufficient to support the conviction of possession of a controlled substance and that the Court of Appeals denied him due process by failing to review the issue of the factual insufficiency of the evidence. While a complete review of the evidence is necessary in order to evaluate this issue should this grant a writ of certiorari, petitioner details the pertinent evidence in the Reasons for Granting the Writ hereinbelow.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the Court of Appeals, Ninth District of Texas at Beaumont, Texas, has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. The Court of Appeals issued an opinion that renders the decisions of this Court concerning insufficiency of the evidence to be of no consequence. Additionally, by failing to even review the factual insufficiency of the evidence, the Court denied petitioner due process.

> (I) ***Corpus delicti.*** "The body of a crime. In a derivative sense, the substance or foundation of a crime, the substantial fact that a crime has been committed." *Black's Law Dictionary, 4th Ed.*, 1968.

Petitioner contends that the evidence of possession of the controlled substance is remarkably underwhelming. The State simply failed to prove the *corpus delicti.* In

viewing the evidence in the light most favorable to the verdict as required by law, there was insufficient evidence to establish that petitioner committed the act of possession as alleged in the indictment.

The reasons compelling review by this court are several. The decision of the Court of Appeals holding that the evidence was sufficient to establish knowledge of the contraband, or the affirmative link, conflicts with decisions of other appellate courts, the same appellate court, and with applicable decisions of this Court and the United States Supreme Court. The Court of Appeals has in effect decided an important question of federal law in a manner in conflict with decisions of this Court and the Texas Court of Criminal Appeals. Petitioner complained that the evidence was insufficient to establish knowledge of the cocaine, or the affirmative link to establish knowing or intentional possession. The Court failed to address the issue for factual sufficiency, holding that nothing was presented for appellate review. Petitioner points out that he in fact addressed the factual basis of his complaint in his brief appended hereto as Appendix D, pointing out the evidence which compelled an acquittal. Petitioner pointed out that his vehicle was stopped for a traffic violation, at which time petitioner stepped out of his vehicle at the request of the investigating officer. After finding no contraband on petitioner, the investigating officer looked into the vehicle and found nothing in plain view. Petitioner readily agreed for the officer to search his vehicle. Following the search, the officer contended that he found a small rock of cocaine beneath the driver's (petitioner) seat, and confronted petitioner. Petitioner addressed the evidence, pointing out that it indicated that

he was calm, polite, and denied any knowledge of the contraband. Not only did the Court of Appeals fail to appreciate the factual insufficiency of the evidence, or address the issue, but even discussed the fact that petitioner was "very calm and very collected," somehow construing that as some indication of guilt! (Petitioner points out that the lack of such behavior, *i.e.* extreme nervousness, is routinely utilized as probable cause for officers to suspect an accused may be in possession of contraband.) Petitioner contends that the Court of Appeals was required to conduct a factual sufficiency review, which would have mandated a reversal of the conviction. *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1986). The Court of Appeals recognized the significance of the distinction between a review for legally sufficient evidence and factually sufficient evidence, recognizing that a legal sufficiency review is an analytical tool used to determine if there is a fact issue at all. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). Had the Court of Appeals conducted a factual sufficiency review, the Court would have found the facts strikingly similar to *Humason v. State*, 728 S.W.2d 363 (Tex. Crim. App. 1987), in which the accused was the driver and sole occupant of a pick-up truck, and was arrested for driving with a suspended license. The police found an open gym bag on the front seat next to him containing a vial of cocaine. The Texas Court of Criminal Appeals held that he could not be legally convicted for possessing a controlled substance unless the evidence affirmatively linked him to the cocaine and held that the evidence was insufficient. Contrary to the contention in the Court's opinion, the Texas Court of Criminal Appeals

has not totally disavowed *Humason, id.*, but merely has rejected the "outstanding reasonable hypothesis test." The applicable law pursuant to *Humason, id.*, and *Clewis, supra,* required the reviewing Court to reverse the conviction on the basis that the evidence is factually insufficient, which the Court wholly failed to do.

Notwithstanding the failure of the Court of Appeals to properly address the factual sufficiency issue, the evidence is also legally insufficient. As described hereinabove, the facts are strikingly similar to *Humason, supra,* and the "affirmative link" was not established. The decision of the Court of Appeals conflicts with *Brown v. State,* 911 S.W.2d 744 (Tex. Crim. App. 1995), and *Brown* is not controlling. The evidence legally failed to establish petitioner had any knowledge of the presence of the cocaine.

Despite the above appellate decisions, the appellate court *presumed* that knowledge was proven simply because it was *possible* that petitioner was guilty. A review of the evidence of the case at bar reveals that no rational trier of fact could have found that petitioner had knowledge of the presence of the contraband beyond a reasonable doubt.

"Possession" is defined as "actual care, custody, or management" Section 1.07(a)(39), Texas Penal Code. In holding that the evidence was sufficient to establish the "affirmative link," the decision of the Court of Appeals conflicts with numerous decisions involving similar facts, in which appellate courts have held the evidence to be insufficient to establish possession. *Allen v. State,* 786 S.W.2d 738 (Tex. App. – Fort Worth 1990); *McBride v. State,* 780 S.W.2d 823 (Tex. App. – San Antonio 1989); *Zertuche v.*

State, 774 S.W.2d 697 (Tex. App. – Corpus Christi 1989); *Baltazar v. State*, 638 S.W.2d 130 (Tex. App. – Corpus Christi 1982).

The evidence produced at trial and the factors discussed by the Court of Appeals in its decision established only that it is possible that appellant was in possession of the contraband. Such does not rise to the level or authorizes a rational trier of fact to find guilt beyond a reasonable doubt, based upon the evidence before the jury. Based upon the evidence produced at trial, petitioner was entitled to an acquittal. *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); *Burks v. U.S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The decision of the Court of Appeals therefore conflicts with the above-cited authorities, and has decided an important question of federal law contrary to existing authority and which should be resolved by this court. Even if petitioner is not entitled to an acquittal, petitioner is at the very least entitled to a factual sufficiency review which must result in a new trial. The Court of Appeals totally failed to address the issues on this basis, thereby denying petitioner the review to which he is entitled by due process.

Not only is the evidence in this cause insufficient to support the conviction, but it overwhelmingly establishes the innocence of petitioner Phillip Jerome Jones. The Court of Appeals did not even address the factual insufficiency issue, even though absolutely required by Texas law to review the properly raised issue. *Bell v. State*, 928 S.W.2d 566 (Tex. Crim. App. 1996). For this reason, petitioner urges that this Court grant a writ of certiorari to

review the opinion of the Court of Appeals, Ninth District of Texas, and that a judgment of acquittal be entered.

This Court should grant certiorari to determine these issues and to resolve the conflict between the opinion of the Court of Appeals, Ninth District of Texas, and this Court in the various cases relating to said issue.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in this case.

DATED: April 25, 1997

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-95-126 CR

PHILLIP JEROME JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D940393

OPINION

(Filed Oct. 23, 1996)

A jury convicted appellant for having committed the felony offense of Possession of a Controlled Substance. Punishment was assessed by the trial court at confinement in the Texas Department of Criminal Justice – Institutional Division for a term of five (5) years, and a fine of $1,000. Appellant presents a single point of error[1] for our consideration, *viz:*

---

[1] We note that appellant labels his complaint as a "ground of error." We shall refer to it as a "point of error." *See* TEX. R. APP. P. 74(d); *Hicks v. State*, 860 S.W.2d 419, 422, n. 1 (Tex. Crim. App. 1993), *cert. denied*, ___ U.S. ___, 129 L.Ed.2d 848, 114 S.Ct. 2725 (1994).

> The State's evidence was legally and factually insufficient to support the jury verdict that Defendant, Phillip Jerome Jones, intentionally and knowingly possessed cocaine found in the automobile.

At the outset, we note the fact that appellant contends that the evidence in the instant case was not only legally insufficient to support the conviction, but factually insufficient as well. Appellant, however, offers no argument or authority in support of his factual insufficiency subpoint. We are aware of the recent case of *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), which does hold that intermediate appellate courts in Texas are permitted to conduct reviews of the evidence for factual insufficiency. As with all issues raised on appeal, factual sufficiency may be reviewed "if it is properly raised." *Id.* at 133. TEX. R. APP. P. 74(f) requires the "argument" of point of error to include "such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue." A factual sufficiency review under *Clewis* requires an appellate court to "view[] all of the evidence without the prism of 'in the light most favorable to the prosecution.' . . . [and] set[] aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* at 129. The mechanics of such a review are obviously quite distinct from those concerning a review for legal sufficiency. This is not surprising as legal insufficiency and factual insufficiency provide separate and independent grounds for relief in the criminal law context. In the instant case, nothing is presented for appellate review on the issue of insufficiency, thus we decline address.

In reviewing the legal sufficiency of the evidence to support a conviction, we review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements to have been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991). The Court of Criminal Appeals emphasized the distinction between a review for legally sufficient evidence and one for factually sufficient evidence in the following language taken from *Clewis, supra.*

> A *Jackson* review, "viewing the evidence in the light most favorable to the prosecution," is not a factual sufficiency review; rather, it is an analytical tool used to determine whether there is a fact issue at all. [footnote and citation omitted] The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Clewis, 922 S.W.2d at 133.

"Possession" is defined as "actual care, custody, control or management." TEX. PENAL CODE ANN. § 1.07(a)(39) (Vernon 1994). To prove unlawful possession of a controlled substance, the State must first prove appellant exercised actual care, control or management over the contraband and second, that appellant had knowledge the substance in his possession was contraband. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). In the instant case, evidence exists that when appellant was confronted with the rock of cocaine found

directly under the driver's seat by the police officer, the following colloquy took place between the officer and appellant:

> [Officer Britt] Can you [appellant] explain where this came from?
>
> [Appellant] You didn't get that out of my car.
>
> [Officer Britt] Well, did you have someone else in your car with you?
>
> [Appellant] No. No one has been in my car.
>
> [Officer Britt] Well, it was under the seat.
>
> [Appellant] No. That wasn't in my car. My brother cleaned my car for me this afternoon.
>
> [Officer Britt] Well, do you think maybe your brother left it in your car?
>
> [Appellant] No. My brother didn't leave nothing in my car. You must have planted that.

Appellant's continued reference to the vehicle as "my car" evidences control over said vehicle in which the contraband was located. Appellant was driving and was the sole occupant of the vehicle. The remaining issue therefore would appear to be whether or not appellant had knowledge of the cocaine rock found beneath the driver's seat.

Circumstantial evidence of a defendant's guilty knowledge is not required to meet the same rigorous criteria for legal sufficiency as circumstantial proof of other offensive elements. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Proof of knowledge is an inference drawn by the trier of fact from all the circumstances. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App.

1978); *Menchaca v. State*, 901 S.W.2d 640, 652 (Tex. App. – El Paso 1995, pet. ref'd). In affirming the validity of the use of "affirmative links" when analyzing circumstantial evidence in offenses involving possession of contraband items, the *Brown* Court expressly disavowed any cases, including *Humason v. State*, 728 S.W.2d 363 (Tex. Crim. App. 1987), that rely on the "alternate reasonable hypothesis" analytical construct. *Brown, supra* at 748. The *Brown* Court further expressly approved of the analysis conducted by the Fort Worth Court of Appeals in its affirmance of the conviction, after holding that the court was mistaken in abandoning the affirmative link analysis. *Id.* at 748-749. We will therefore apply the Fort Worth Court's analysis and reasoning in examining the evidence in the instant case including references to affirmative links between appellant and the contraband.

Texas courts have consistently held that mere presence at the scene of an offense is not sufficient to establish unlawful possession of a controlled substance. *McGoldrick v. State*, 682 S.W.2d 573, 578-579 (Tex. Crim. App. 1985). However, presence at the scene of an offense is a circumstance tending to prove guilt which, combined with other facts or circumstances, may be sufficient to establish guilt. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987). Our Court has recognized the following as factors tending to establish affirmative links of proof of knowledge in possession cases:

> (1) the accused was the owner of the premises in which the contraband was found;
>
> (2) the contraband was conveniently accessible to the accused;

(3) the contraband was found in close proximity to the accused;

(4) the place where the contraband was found was enclosed;

(5) the accused was the driver of the vehicle in which the contraband was found;

(6) the contraband was found on the same side of the car seat as the accused was sitting.

Dixon v. State, 918 S.W.2d 678, 681 (Tex. App. – Beaumont 1996, n.p.h.); *Watson v. State*, 861 S.W.2d 410, 414-415 (Tex. App. – Beaumont 1993, pet. ref'd), *cert. denied*, 511 U.S.___, 128 L.Ed.2d 376, 114 S.Ct. 1659 (1994).

In the instant case, evidence of the above six factors was present from the testimony of the state's witnesses. Additionally, the street upon which appellant's vehicle was initially observed parked was known as "Crack Alley" apparently in reference to the high incidences of drug trafficking occurring in the area. Further testimony also indicated that the driver's seat area next to the driver's door inside appellant's vehicle was contoured in such a way that if appellant had dropped the cocaine rock in that area, the rock could have rolled under the seat to the location where it was found. Appellant was also described by the officers as nonchalant, very calm and very collected. It has been held that an inference of knowledge from the lack of concern or surprise is proper. *United States v. Del Aguila-Reyes*, 722 F.2d 155, 158 (5th Cir. 1983); *Castellano v. State*, 810 S.W.2d 800, 807 (Tex. App. – Austin 1991, no pet.).

It must be remembered that a reviewing court's role is not to ascertian whether the evidence establishes guilt

beyond a reasonable doubt. *Stoker v. State*. 788 S.W.2d 1, 6 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 951, 112 L.Ed.2d 333, 111 S.Ct. 371 (1990). When conducting a review for legally sufficient evidence, we do not resolve any conflict, weigh any evidence or evaluate the credibility of any witnesses, so that the fact-finding results of the jury are given great deference. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992). In the instant case, we find that the evidence contained in the record would permit any rational trier of fact to find appellant exercised control over and had knowledge of the contraband in question beyond a reasonable doubt. Viewing the evidence in the light most favorable to the prosecution, a fact issue was indeed raised on both issues. *Clewis*, 922 S.W.2d at 133. Appellant's point of error is overruled. The judgment and the sentence are affirmed.

AFFIRMED.

PER CURIAM

Submitted on May 23, 1996
Opinion Delivered October 23, 1996
Do Not Publish

Before Walker, C.J., Burgess and Stover, JJ.

APPENDIX B

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308 CAPITAL STATION,
AUSTIN, TEXAS 78711

January 29, 1997
COA#: 09-95-00126-CR
RE: Case No. 1645-96
STYLE: JONES, PHILLIP JEROME

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

DOUGLAS M BARLOW
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APPENDIX C

AMENDMENT V TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in times of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

NO. 09-95-00126-CR

IN THE COURT OF APPEALS IN AND FOR
THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT BEAUMONT

****

PHILLIP JEROME JONES,

APPELLANT

VS.

THE STATE OF TEXAS,

APPELLEE

****

APPEALED FROM THE 260TH DISTRICT COURT
ORANGE COUNTY, TEXAS

****

BRIEF OF APPELLANT

****

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(Filed Sep. 11, 1995)

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"The State's evidence was legally and factually insufficient to support the jury verdict that Defendant, Phillip Jerome Jones, intentionally and knowingly possessed cocaine found in the automobile."

NO. 09-95-00126-CR

IN THE COURT OF APPEALS IN AND FOR
THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT BEAUMONT

****

PHILLIP JEROME JONES,

APPELLANT

VS.

THE STATE OF TEXAS,

APPELLEE

****

APPEALED FROM THE 260TH DISTRICT COURT
ORANGE COUNTY, TEXAS

****

BRIEF OF APPELLANT

****

TO THE HONORABLE COURT OF APPEALS:

PHILLIP JEROME JONES, Defendant in Cause No. D-940393, in the 260th District Court of Orange County, Texas, Honorable Buddie Hahn, Judge Presiding, and

defendant before the Court of Appeals respectfully submits this brief to the respective courts for the purpose of appealing his conviction of POSSESSION OF A CONTROLLED SUBSTANCE, to-wit: COCAINE

For convenience, the parties will be referred to as the "Defendant" and the "State".

STATEMENT OF THE CASE

This is an appeal from a conviction of Possession of a Controlled Substance, to-wit: Cocaine.

The Defendant was driving his vehicle in the City of Orange, Orange County, Texas, on February 24, 1994. Officer Britt testified that at approximately 1:00 a.m., he observed a light gray Ford Probe turn north on Third (3rd) Street and come to a intersection and did not make a complete stop. Officer Britt radioed Officer Journeay and told him the defendant did not make a complete stop. Officer Journeay initiated his overhead lights and made the stop. Officer Britt came to the area of the stop and approached the Defendant, who was sitting in the driver seat of the Probe automobile. At that time, Officer Britt asked the Defendant to step out of the vehicle, and began to pat down the Defendant, nothing illegal or incriminating was found on the Defendant. Officer Britt looked into the vehicle and found nothing in plain view. The officer than asked the Defendant if he could "look" in his car and the Defendant responded "yeah, your're [sic] the Police, go ahead". Officer Britt found a very small rock of cocaine under the driver's seat. Officer Britt brought the rock of cocaine back to the Defendant to get him to

explain how the rock got into his car. When the Defendant was shown the rock of cocaine, he denied the rock was his and that no one had been in his care [sic] to leave the rock of cocaine, that his brother had cleaned his car and nothing was in it. Officer Britt asked "How did the rock get in your car"? The Defendant replied, "I guess you planted it there". S. F. Vol. 3 Page 45

Further, the Defendant was very calm, very polite, and nonchalant. S. F. Vol. Page 56 There was no evidence of any controlled substance on the Defendant; no evidence that the Defendant's physical condition indicated recent consumption of contraband; no evidence of any paraphernalia to use contraband; no evidence of how long Defendant had been driving the vehicle; no evidence of contraband in plain view; and no affirmative statement by the Defendant to connect Defendant to contraband.

GROUND OF ERROR NO. 1 RESTATED

The State's evidence was legally and factually insufficient to support the jury verdict that Defendant, PHILLIP JEROME JONES, intentionally and knowingly possessed cocaine found in the automobile.

ARGUMENT AND AUTHORITIES UNDER GROUND OF ERROR NO. 1

The Defendant is indicted for intentionally and knowingly possessing a controlled substance, to-wit: cocaine.

The State must prove beyond a reasonable doubt at least two evidentiary requirements which are as follows:

1. The State must prove that the Defendant exercised care, control and management over the substance; and

2. That he (the Defendant) knew what he possessed was contraband.

"Possession" means "actual care, custody and control. Health and Safety Code Sec. 1.02(34) formerly V.A.C.S. Article 4476-15. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing possessed for a sufficient time to permit him to terminate his control. Health and Safety Code, V.A.C.S. Article 481.112, formerly 4476-15 Sec. 1.02 (34).

Intentionally is defined as "a person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct or result. V.A.C.S. Penal Code 6.03(a).

Knowingly is defined as "a person acts knowingly, or with knowledge with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonable certain to cause the result". V.A.C.S. Penal Code 6.03(b)

The State must prove at a minimum, that the Defendant be aware that his conduct or circumstances surrounding his conduct constitutes possession of controlled substance.

It is not enough for the State to show that a Defendant was merely present in the vicinity of the cocaine. *Bucklin v. State* 634 SW2nd 44 (Ct. App. Bmt. 1982).

However, the State may prove these elements circumstantially. *McGoldrick v. State* 682 SW2nd 573, (S78 Tex. Crim. App. 1985)

The State must show the Defendant was *aware* that his conduct or the circumstances surrounding his conduct constituted possession of a controlled substance. *Humason v. State* 728 SW2nd 363 (Tex. Crim. App. 1987)

Proof that amounts to only a strong suspicion or mere probability is insufficient to support a conviction. *Humason v. State* 728 SW2nd 365. The evidence must establish affirmative links, beyond mere presence, between Defendant and the controlled substance. *Humason v. State* 728 SW2nd 365.

Defendant, Phillip Jerome Jones' immediate response to Officer Britt was "it's not mine, you must have planted it" SF. Vol 3 page 45. The Defendant was calm and did not attempt to flee. There is no evidence that the record that Defendant had sole access to the Probe automobile prior to the stop. In fact, the Probe automobile had been washed and vacuumed. SF Vol. 3 pg. 45.

There is no evidence in the record that Defendant owned the Probe. Furthermore, there is no evidence in the record that the Defendant had some connection to the controlled substance, other than physical proximity or that the defendant was familiar with cocaine in general.

The only affirmative link is that the Defendant was driving in his own neighborhood.

In anticipation of the State argument that the Defendant stopped at a residence which was suspected of having drugs. Defendant's reply that visiting a house is not probative evidence that defendant knew that the residence was doing drugs.

Taken together, these "links" shows the Defendant in his own neighborhood and visited a residence for some unknown reason, cannot infer from the evidence that the Defendant was aware of cocaine found in his car. The State has failed to show any common "link" of controlled substance, other than *mere presence,* to the Defendant.

There is no evidence that the cocaine was in plain view, no furtive gestures, no attempt to escape, no incriminating statement, no traces of cocaine or drug paraphernalia on Defendant's person, no evidence that the Defendant was under the influence of a controlled substance or cocaine, no evidence that the Defendant had sole access to the vehicle, no evidence of ownership of the vehicle or consciousness of guilt. *Whitworth v. State,* 808 SW2nd 566, 569 (Tex. App. 1991, pet. ref'd)

The State has failed to prove the mens rea element of "knowingly" and intentionally possession beyond a reasonable doubt.

Thus, to show possession, the evidence must affirmatively link the defendant to the cocaine by showing the indicia of possession set out in the charge. *McGoldrick v. State* 682 SW2nd 573 (Tex. Crim App. 1985), which the State has failed to prove.

The State's evidence is factually insufficient as well as legally insufficient to sustain a conviction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the verdict in said cause upon Appellate Review of the Court of Appeals be reversed for insufficient evidence factually and legally.

Respectfully submitted,

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ATTORNEY FOR
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REQUEST FOR ORAL ARGUMENT

Attorney for Appellant hereby makes his request that this matter be set before this Honorable Court of Appeals for Oral Arguments.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above was served on opposing counsel, the Orange County District Attorney's Office, Orange County Courthouse, Orange, Texas 77630 in accordance with the Texas Rules of Civil Procedure on September 11, 1995, by certified mail, return receipt requested or hand delivery.

/s/ Jim Sharon Bearden
JIM SHARON BEARDEN

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1720

In The

Supreme Court of the United States

October Term, 1996

PHILLIP JEROME JONES,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, Ninth Supreme Judicial District at Beaumont, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does the conviction herein violate Federal standards regarding sufficiency of the evidence on the basis that the evidence failed to establish the *actus reus* of the offense, thereby deciding an important question of federal law in a way that conflicts with relevant decisions of this Court?

(2) Does the decision of the Court of Appeals deny petitioner due process of law by failing to review the appellate complaint concerning factual sufficiency of the evidence?

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APPENDIX

Appendix A — Brief for the State of Texas to the Court of Appeals, Ninth Supreme Judicial District, Beaumont, Texas 1a

Respondent, the State of Texas respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the decision of the Court of Appeals, Ninth Supreme Judicial District at Beaumont, Texas which is reprinted in the Petition for Writ of Certiorari as Appendix A.

STATEMENT OF THE CASE

The facts of this case are clearly stated in the Statement of Relevant Facts of Respondent's brief before the Court of Appeals, Ninth Supreme Judicial District at Beaumont, Texas reprinted as Appendix A to this response.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS BY REFUSING TO REVIEW THE JURY'S FINDINGS CONCERNING FACTUAL SUFFICIENCY OF THE EVIDENCE.

Petitioner waived any right to a review of the jury's decision based upon alleged factual insufficiency because Petitioner failed to properly brief the issue. *Lawton v. State*, 913 S.W. 2d 542, 558 (Tex. Crim. App. 1996). Tex. R. App. P. 74(f) states in pertinent part, "The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the fact and the authorities relied upon as may be requisite to maintain the point at issue." The Court of Appeals correctly held that Petitioner failed to comply with Tex. R. App. P. 74(f)(2) when presenting the case on appeal.

Petitioner identified the sole point of error in his brief to

the Court of Appeals as "State's evidence was legally and factually insufficient to support the jury verdict that Defendant, Phillip Jerome Jones, intentionally and knowingly possessed cocaine in the automobile." Petitioner proceeded to brief the issue without arguing any distinction between the standards for determining legal and factual sufficiency. The standard of review for sufficiency of the evidence in Texas at the time that the case was tried and the briefs were presented to the Court of Appeals, was whether or not when the appellate court reviewed all the evidence in the light most favorable to the verdict any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Jackson v. State*, 672 S.W. 2d 801 (Tex. Crim. App. 1984); *Thompson v. State*, 697 S.W. 2d 413 (Tex. Crim. App. 1985).

All cases cited by Petitioner in his original brief to the Court of Appeals were based upon the *Jackson v. Virginia* standard of reviewing sufficiency of the evidence. At no time did Petitioner ever file a supplemental brief or argue that the proper standard of review was something other than *Jackson v. Virginia*.

Petitioner cannot, for the first time, argue that a different standard now applies under *Clewis v. State*, 922 S.W. 2d 126 (Tex. Crim. App. 1996). Further, the *Clewis* standard for factual sufficiency of the evidence, which is now a proper standard of review for factual sufficiency in Texas criminal courts, has no federal counterpart. The standard of review for sufficiency of evidence (factual or legal) in federal criminal cases is still *Jackson v. Virginia*.

II.

THERE IS NO CONFLICT AMONG ANY JURISDICTIONS WITH RESPECT TO THE SUFFICIENCY OF THE EVIDENCE STANDARD.

The standard of review for sufficiency of evidence in federal criminal cases is *Jackson v. Virginia*. The standard of review applied by the Court of Appeals in this case was that of *Jackson v. Virginia*. *See* The Court of Appeals Opinion in Petitioner's Petition Appendix A at App. 3. Petitioner fails to identify which United States Supreme Court decisions and Texas Court of Criminal Appeals decisions with which the lower Texas Appellate Court is in conflict. In reviewing the law applied by the various courts, the federal standard of review for sufficiency of the evidence is that outlined in *Jackson v. Virginia*. This same standard was applied by the United States Court of Appeals, Fifth Circuit in *United States v. Del Aguila-Reyes*, 722 F.2d 155, 157 (5th Cir. 1983) and *United States v. Heacock*, 31 F.3d 249, 251-252 (5th Cir. 1994). The same standard outlined in *Jackson v. Virginia* has long been the standard applied by the Texas Court of Criminal Appeals to review evidentiary sufficiency. *See Jackson v. State*, 672 S.W. 2d at 801; and *Thompson v. State*, 697 S.W. 2d at 413. (The distinction between a review of legal sufficiency under *Jackson v. Virginia* versus factual sufficiency under *Clewis*, is a recent development in Texas criminal law which has no corresponding basis under federal law. The *Clewis* court continues to identify the proper standard of review for legal sufficiency as that outlined in *Jackson v. Virginia*). Finally, the standard for review as applied by the Ninth Court of Appeals at Beaumont, Texas is also *Jackson v. Virginia*. *See Dixon v. State*, 918 S.W. 2d 678, 679 (Tex. App. — Beaumont 1996, no pet.). There is no conflict among the jurisdictions regarding the proper standard of review for sufficiency of the evidence which lends itself to review by this Honorable Court.

III.

THE CASES RELIED UPON BY PETITIONER TO ALLEGE THAT RESPONDENT'S CASE WAS FACTUALLY INSUFFICIENT USE THE OUTSTANDING REASONABLE HYPOTHESIS THEORY WHICH HAS BEEN OVERRULED BY THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner argues that the evidence presented by Respondent at trial was insufficient to prove an "affirmative link" between Petitioner and the rock of crack cocaine found in his vehicle. Petitioner relies upon a line of cases supported by *Humason v. State*, 728 S.W. 2d 363 (Tex. Crim. App. 1987). *Humason* required a different standard of proof for circumstantial evidence cases such that a conviction based upon circumstantial evidence could not be sustained if the state's proof did not exclude every other reasonable hypothesis except the guilt of the Defendant. *Id.* at 366. All of Petitioner's cases cited for the proposition that Petitioner was not affirmatively "linked" to the cocaine in his possession rely upon *Humason* or other cases citing the outstanding reasonable hypothesis theory. *See Allen v. State*, 786 S.W. 2d 738, 740 (Tex. App. — Fort Worth 1989, pet. dism'd); *McBride v. State*, 780 S.W. 2d 823, 824-825 (Tex. App. — San Antonio 1989, no pet.); *Baltazar v. State*, 638 S.W. 2d 130, 131 (Tex. App. — Corpus Christi 1982, no pet.); and *Zertuche v. State*, 774 S.W. 2d 697, 700 (Tex. App. — Corpus Christi 1989, pet. ref'd).

Humason and Petitioner's line of cases were brought into question in *Geesa v. State*, 820 S.W. 2d 154 (Tex. Crim. App. 1991). There was, for a time, a question in Texas courts as to whether the "affirmative links" analysis or the "outstanding reasonable hypothesis" test were applicable in a review of the sufficiency of the evidence in Texas criminal cases. *Brown v.*

State, 911 S.W. 2d 744 (Tex. Crim. App. 1995). *Brown* overruled the outstanding reasonable hypothesis test when reviewing circumstantial evidence in Texas criminal cases. This effectively undermines the reasoning of *Humason* and its progeny which are the whole basis of Petitioner's argument. The Court of Criminal Appeals was clear when it stated

> Nevertheless, some of our precedents, including *Humason*, do invoke the "outstanding reasonable hypothesis" standard in connection with a search for evidence linking the accused to illegal drugs. Clearly, any aspect of those cases which rely on that standard no longer control. The ultimate consequence is that each defendant must still be affirmatively linked with the drugs he allegedly possessed, but this link need no longer be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *Brown v. State*, 911 S.W. 2d at 748.

The outstanding reasonable hypothesis test was abandoned by the Fifth Circuit Court of Appeals in *United States v. Bell*, 678 F.2d 547 (5th Cir. 1992), *aff'd*, 462 U.S. 356 (1983). Therefore, the failure of the Texas criminal courts to use the outstanding reasonable hypothesis test in reviewing circumstantial evidence convictions is not in conflict with the federal courts or the United States Supreme Court.

IV.

THE EVIDENCE AT TRIAL WAS SUFFICIENT TO PROVE THAT PETITIONER INTENTIONALLY AND KNOWINGLY POSSESSED COCAINE.

The *Brown* court pointed out that the affirmative links analysis is a means to an end and not an end in itself. *Brown v. State*, 911 S.W. 2d at 748. Petitioner's mere presence where drugs are found, without any other evidence, is not sufficient to establish unlawful possession of a controlled substance. *McGoldrick v. State*, 682 S.W. 2d 573, 578-579 (Tex. Crim. App. 1985). The facts in this case include more than mere presence and clearly support the jury's verdict either under a *Jackson v. Virginia* legal sufficiency analysis or a *Clewis* factual sufficiency analysis.

The facts in this case have been recognized by Texas courts as tending to establish an affirmative link proving criminal knowledge and intent. *Dixon v. State*, 918 S.W. 2d at 681. Petitioner was stopped after being parked in front of a known crack house at 1:00 a.m. A single rock of crack cocaine was found in his vehicle. The drugs were hidden under the Petitioner's drivers seat within his reach. Petitioner was the sole occupant of the vehicle at the time of the stop. Petitioner further made *res gestae* statements at the scene which clearly support the jury's verdict in this case. Petitioner stated he owned the vehicle. Petitioner stated that no one had access to his vehicle prior to the stop. Petitioner stated that his brother had cleaned the car earlier that afternoon and no one had been in his car. When the officer presented the rock of crack cocaine and asked Petitioner about the, as yet, unidentified object, Petitioner immediately responded that the officer had not found "that" in his vehicle. Petitioner did not express any shock or surprise at the officer's presentation of the drugs to him at the scene.

Petitioner's reaction was such that he knew and understood what was being presented to him by the police officer at the time. Further, the only explanation offered by Petitioner was the unfounded allegation that the officer had planted the rock of crack cocaine in his vehicle. There is no evidence to substantiate this allegation.

Petitioner argues that his calm attitude cannot be used to incriminate him. A lack of concern or surprise has been held to be a proper inference of knowledge. *See United States v. Del Aguila Reyes*, 722 F.2d at 158; and *Castellano v. State*, 810 S.W. 2d 800, 807 (Tex. App. — Austin 1991, no pet.). Use of the affirmative links analysis is not merely an exercise of counting the total number of "links" the defendant has to the drugs, but moreover, a method of looking at the totality of the circumstances and determining whether or not, when viewed in the light most favorable to the verdict, the evidence is sufficient to support the jury's verdict.

CONCLUSION

Petitioner, having waived any right to a factual sufficiency review under state law, and having failed to establish any conflict between this Court or other courts and the Court of Appeals below, is not entitled to have his conviction reviewed by this Honorable Court, and therefore, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — BRIEF FOR THE STATE OF TEXAS TO THE COURT OF APPEALS, NINTH SUPREME JUDICIAL DISTRICT, BEAUMONT, TEXAS

NO. 09-95-00126-CR

IN THE COURT OF APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

PHILLIP JEROME JONES, Appellant

VS.

THE STATE OF TEXAS, Appellee

Appealed from the 260th District Court
Orange County, Texas
Cause No. D-940,393-CR

STATE'S BRIEF

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ORAL ARGUMENT REQUESTED

* * *

Appendix A

NO. 09-95-00126-CR

IN THE COURT OF APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

PHILLIP JEROME JONES, Appellant

VS.

THE STATE OF TEXAS, Appellee

TO THE HONORABLE JUDGES OF SAID COURT:

The Appellant, Phillip Jerome Jones, was convicted of the felony offense of possession of a controlled substance, to wit: cocaine, upon a plea of "not guilty" in the 260th Judicial District Court, Orange County, Texas, Buddie J. Hahn, presiding Judge.

PRELIMINARY STATEMENT

Appellant, Phillip Jerome Jones, was indicted under Cause No. B-940,393 for felony possession of a controlled substance, to wit: cocaine. On March 20, 1995, the case was called to trial, and a jury was impaneled and selected. On March 21, 1995, Appellant pled "not guilty". The jury found the Appellant guilty on March 22, 1995. On April 17, 1995, punishment evidence was presented to the trial court, and the trial court assessed punishment at five years in the Texas Department of Criminal Justice — Institutional Division and a fine of $1,000.00. Said judgment and sentence were entered by the trial court on April 24, 1995.

Appendix A

APPELLANT'S GROUND OF ERROR NUMBER ONE — RESTATED

STATE'S EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE JURY VERDICT THAT DEFENDANT, PHILLIP JEROME JONES, INTENTIONALLY AND KNOWINGLY POSSESSED COCAINE IN THE AUTOMOBILE.

STATEMENT OF RELEVANT FACTS

The State called two officers from the City of Orange Police Department to testify regarding the facts surrounding the arrest of Appellant, Phillip Jerome Jones. Officer A.C. "Tony" Britt testified that on Thursday, February 24, 1994, at approximately 1:00 a.m., he was patrolling the Navy Park addition in the City of Orange. (Vol. 3 pp. 31-32) Officer Britt identified this as a known drug trafficking area. (Vol. 3 p. 33) Officer Britt had been a peace officer with the City of Orange Police Department for approximately three years and was familiar with the general area. (Vol. 3 pp. 28, 34) During Officer Britt's patrol that evening he identified a light gray Ford Probe parked in front of 302 and 304 Knox Street. (Vol. 3 p. 36) 304 Knox is known to officer Britt as a location of drug activity. (Vol. 3 p. 40)

At approximately 1:00 a.m., Officer Britt observed a light gray Ford Probe fail to stop at a marked intersection. (Vol. 3 p. 37) This vehicle was previously identified as being parked at 304 Knox Street. (Vol. 3 p. 36) Upon observing the traffic violation, Officer Britt radioed Officer Wes Journeay of the City of Orange Police Department. Officer Journeay was also on patrol in the Navy Park addition. (Vol. 3 p. 37) Officer Journeay pulled in behind the gray Ford Probe and observed the vehicle

fail to signal a right turn. (Vol. 3 pp. 102-103) Officer Journeay pulled the gray Ford Probe over and he observed one occupant driving the vehicle. (Vol. 3 pp. 103,107) Officer Journeay began to issue a citation, for the observed traffic violation, to the driver who was identified by driver's license as Phillip Jerome Jones. (Vol. 3 p. 105) At this time, Officer Britt arrived on the scene and asked to look in Appellant's light gray Ford Probe. (Vol. 3 pp. 42, 43) Appellant verbally consented by responding "Yeah. You're the police. Go ahead." (Vol. 3 p. 43)

During his search Officer Britt found a small white rock suspected to be crack cocaine under the driver's seat. (Vol. 3 p. 43) Upon analysis by Sarah Skiles of the Jefferson County Regional Crime Lab, the substance was determined to be 0.17 grams of crack cocaine. (Vol. 3 pp. 20,21) When officer Britt showed the small white rock to the Appellant and asked if he could explain it, Appellant, Jones, responded that the rock was not his. Further, Appellant stated that no one had been in his car to leave the rock; that his brother had cleaned his car earlier that afternoon; and that nothing was left in his car by anyone. When officer Britt asked "Well, how did the rock get in your car?", Appellant responded "Well, I guess you planted it there." (Vol. 3 pp. 44,45).

Officer Britt's testimony corroborated Appellant's statement that the car had recently been cleaned, it was very clean inside and was not cluttered. (Vol. 3 pp. 45,86,93) Officer Britt testified that the location of the rock was three to four inches under the driver's seat and accessible to the driver. (Vol. 3 pp. 48,53) Officer Britt's testimony reiterated several times that Appellant stated Officer Britt had not gotten "that" (the rock of crack cocaine) out of his (Appellant's) car. (Vol. pp. 44-45, 90,92,93) Further, Officer Britt testified that Appellant's demeanor when

confronted with the rock of crack cocaine did not exhibit any signs of shock, surprise, or excitement. (Vol. 3 pp. 54,55)

Officer Journeay testified corroborating Officer Britt's testimony that the Defendant was alone in the vehicle at the time of the stop, and that no one came near the car during the stop. (Vol. 3 p. 107).

The Appellant called no witnesses to testify in support of Appellant's off-the-wall allegation that Officer Britt had planted the rock of crack cocaine in the Appellant's car. Further, Appellant called no witnesses to refute any of the testimony presented by the State in this matter. The only testimony upon which the jury could rely was that presented by the State.

STATE'S ARGUMENT AND AUTHORITIES

In reviewing the sufficiency of the evidence, an Appellate Court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); *Jackson v. State*, 672 S.W.2d 801 (Tex.Crim.App. 1984). Further, the appeals court must review all of the evidence in the light most favorable to the prosecution. *Thompson v. State*, 697 S.W.2d 413 (Tex.Crim.App. 1985).

The essential elements for Possession of Cocaine under V.T.C.A., Health & Safety Code (1992) § 481.115 are: 1) the defendant; 2) intentionally and knowingly possessed; 3) a controlled substance, to wit: cocaine.

Appellant complains that the State failed to prove possession beyond a reasonable doubt. Under V.T.C.A., Health & Safety

Code (1992) § 481.002 (38), "possession" means "actual care, custody, control or management."

Although Appellant analyzes this case in terms of "affirmative links," in light of *Jackson v. Virginia* and this Appellate Court's opinion in *Eaglin v. State*, 872 S.W.2d 332 (Tex.App. — Beaumont 1994), it appears that a slightly different analysis applies. The standard as stated in *Eaglin* is whether, after considering all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found that Appellant intentionally or knowingly possessed the contraband in question beyond a reasonable doubt. *Eaglin* at 337. Further, it is clear that "in circumstantial evidence cases, it is not necessary that every fact point directly and independently to the Defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating evidence." *Eaglin* at 337.

In this specific case, two issues must be considered. Did the Appellant have: 1) control of the contraband in question; and 2) knowledge of the contraband in question.

What evidence was presented at the trial court level to prove that Appellant exercised control over the cocaine? The evidence presented showed the Appellant was in sole possession of the vehicle at the time of the traffic stop. (Vol. 3 pp.42, 107) See *Aldridge v. State*, 482 S.W.2d 171 (Tex.Crim.App. 1972). The Appellant identified the car as being his. (Vol. 3 pp. 44-45 90,92,93) See *Moulden v. State*, 576 S.W.2d 817 (Tex.Crim.App. 1978). The Appellant acknowledged that no one else had been in his car to leave the rock of cocaine. (Vol. 3 pp. 44-45, 92) The Appellant acknowledged that his brother had cleaned the car that afternoon, and no one (other than himself) had been in

the car since then to leave the rock of cocaine. (Vol. 3 pp. 44-45,93) The rock of cocaine was found under the driver's seat. (Vol. 3 pp. 43,48,53,93) See *Orosco v. State*, 164 Tex.Cr.R. 257, 298 S.W.2d 134 (1957). The rock was placed in a position easily accessible to the sole occupant, Appellant. (Vol. 3 pp. 47-48,53) See *Hahn v. State*, 502 S.W.2d 724 (Tex.Crim.App. 1973). All these fact taken together provide more than enough evidence for the jury to find that the Appellant did indeed possess the cocaine found in his vehicle.

Did the Appellant have knowledge of the contraband in question? Proving mental state is a difficult proposition. Without the actual statement of a person, it is very difficult to determine their mental culpability for the commission of a crime. Proof of culpable mental state generally relies upon circumstantial evidence. *Gardner v. State*, 736 S.W.2d 179, 182 (Tex.App. - Dallas 1987), *aff'd*, 780 S.W.2d 259 (Tex.Crim.App. 1989). Intentional and knowing possession is an inference that must be drawn by the jury from all of the circumstances. *Eaglin* at 337.

In this case, when the Appellant was shown the "rock" of cocaine, the Appellant responded that the officer had not found that substance in his car and that the officer must have planted it. (Vol. 3 pp. 44-45;93) There is no testimony that Officer Britt had to identify the item to the Appellant. Logically, there is no reason for someone to deny possession of a legal substance. Appellant's definitive denial of possession the small rock implies Appellant knew the substance to be contraband. Appellant at no time questioned Officer Britt regarding the nature of the small rock. Further, Appellant accused Officer Britt of planting the small rock without ever asking Officer Britt what the substance was. A reasonable jury could have, and did, find Appellant knew the substance to be contraband (crack cocaine).

Appendix A

The Appellant's reaction at the scene is further evidence of his culpable mental state. Upon presentation of the rock of crack cocaine by the patrol officer, the Appellant's reactions were somewhat subdued. The Appellant failed to show any shock, surprise, or other reaction of disbelief upon the presentation of the crack cocaine.(Vol. 3 pp. 54-55) Appellant's proffered explanation for the event was that the patrol officer had planted the crack cocaine in his vehicle. (Vol. 3 pp. 44-45;93) Simply because the Appellant has presented a different version of events does not render the State's evidence insufficient in this case. See *Little v. State*, 758 S.W.2d 551, 562-563 (Tex.Crim.App. 1988) *cert. denied*, 488 U.S. 934, 109 S.Ct. 328, 102 L.Ed. 2d 346 (1988). Conceivably, a jury could choose to disbelieve Appellant's unsupported allegation of a drug plant. Further, a reasonable jury could, and did, conclude Appellant failed to react as an innocent person would if drugs were planted in their car or on their person. A jury could also reasonably conclude that being shocked, surprised, and excited, rather than calm, cool, and collected would be the appropriate reaction for someone who did not know that he was carrying drugs in his car.

Officer Britt testified that Appellants car was parked in front of 304 Knox Street earlier. (Vol. 3 pp. 36,40) This house was a site of known criminal activity including possession and/or delivery of illegal drugs, such as crack cocaine. (Vol. 3 pp. 36,40) All of these facts together support the jury's verdict that the Appellant did intentionally or knowingly possess a controlled substance, to wit: cocaine. The Defendant failed to present any contradictory evidence regarding control and knowledge of the contraband in question.

Appellant relies upon *Humason v. State*, 728 S.W.2d 365 (Tex.Crim.App. 1987) for the proposition that mere presence of

the Appellant at the point where the controlled substance was found is not enough to convict him. The State would agree with this proposition generally, but would also point out Appellant's presence was not the only evidence which "links" him to the crack cocaine.

Further, Appellant relies on *Whitworth v. State*, 808 S.W.2d 566, 569 (Tex.App. — Austin 1991), for the proposition that the State has failed to meet the criteria necessary to prove the Appellant was guilty of possession of crack cocaine beyond a reasonable doubt. Appellant misstates the evidence when he says that there is "no evidence that the Appellant has sole access to the vehicle, no evidence of ownership of the vehicle or consciousness of guilt." All of these facts are setforth above in the State's brief and clearly show Appellant's statement to be untrue.

Appellant also relies on *McGoldrick v. State*, 682 S.W.2d 573 (Tex.Crim.App. 1985), to say that the State has failed to meet its burden by not affirmatively linking the Appellant to the cocaine through a showing of the criteria for possession set out in the charge. If this court chooses to analyze this case in terms of "affirmative links" the facts and evidence set out above presented the jury more than enough evidence to find Appellant guilty of possession of crack cocaine beyond a reasonable doubt.

CONCLUSION

In the case at bar, viewing the evidence in the light most favorable to the verdict, the evidence clearly meets the requirement that a rational trier of fact must, and did, find Appellant guilty beyond a reasonable doubt.

Appendix A

PRAYER

WHEREFORE, PREMISES CONSIDERED, since no reversible error is shown, the State respectfully prays that this Court affirm the conviction of Appellant, Phillip Jerome Jones.

Respectfully submitted,

John D. Kimbrough
Orange County Attorney

/s/ John D. McElroy
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been forwarded to attorney for Appellant, Mr. Sharon Bearden, 116 S. Border, Orange, Texas 77630 via certified mail on this the ___ day of _____, 1995.

/s/ John D. McElroy
John D. McElroy
Assistant County Attorney